Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review	)	MB Docket No. 02-277
	)	
Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap	)	

COMMENTS OF
THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., BLACK CITIZENS FOR A FAIR MEDIA, PHILADELPHIA LESBIAN AND GAY TASK FORCE, AND WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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SUMMARY

The Office of Communication of the United Church of Christ, Inc., *et al.* (UCC) respectfully submit comments in response to the Media Bureau's request for additional information about whether Congressional enactment of the 39% national cap affects the FCC's authority to modify or eliminate the UHF discount. Nothing in the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (Appropriations Act), changes the FCC's existing authority to modify or eliminate the UHF discount, nor does passage of the Act signify Congressional approval, adoption, or ratification of the 50% UHF discount. Section 629(1) rolled back the Commission's 45% national audience reach limitation to 39%, Section 629(2) codified already existing FCC practices of divestitures and forbearance, and Section 629(3) changed the biennial media ownership review to quadrennial and exempted modification of the 39% cap from the quadrennial review.

The plain language of the Appropriations Act does not refer to the UHF discount or the method of calculating the national audience reach limitation. If anything, enactment of the Appropriations Act signifies Congressional approval of the all the policies and regulations that make up the national audience reach cap, including the Commission's established practice of evaluating and reevaluating the efficacy and continued need for the UHF discount. At most, the language in Section 629(3) of the Appropriations Act might be found ambiguous, in which case the Commission can reasonably interpret the statute. The only reasonable interpretation is that FCC authority to modify or eliminate the UHF discount continues. Stripping the agency of that authority would be illogical and at direct odds with the purpose of the Appropriations Act, the 1996 Telecommunications Act, and Supreme Court standards of statutory interpretation.

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BACKGROUND

The FCC created the UHF discount in 1985 and has retained the authority to modify or repeal its regulation since then. Nothing in the Appropriations Act changes that authority.

Even before it created the UHF discount, the FCC developed other methods to address the competitive disparity between UHF and VHF stations. In 1978, the Commission's UHF Comparability Taskforce found that the technological conditions at the time resulted in a disparity between the audience reach of UHF and VHF station signals. *Comparability for UHF Television: Final Report, September 1980* at 2. *See Improvements to UHF Television Reception Report and Order*, 90 FCC 2d 1121, 1124 (1982) (1982 Order). The 1982 Order recognized that although UHF stations did not have comparable audience reach at the time, there were methods to fix the problem. The Commission promulgated rules to improve UHF television receiver

standards and allow UHF stations to eliminate much of their audience reach handicap. *See 1982 Order* at 1127-49.

In 1985, when the FCC first adopted a national audience reach limit, it developed the UHF discount to deal with the competitive disparity between UHF and VHF signal reach. *Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, 93 (1985) (1985 Order). Several commenters in that proceeding proposed that the FCC raise the actual national audience limit as a way to account for UHF disparities. The Commission rejected those proposals and stated that:

> Consistent with the diversity objectives expressed in our ownership rules, we believe that a more appropriate indicator of the reach handicap of UHF stations is one that measures the actual coverage limitation inherent in the UHF signal. Therefore, with respect to the audience reach limit adopted herein, we believe that owners of UHF stations should be attributed with only 50% of . . . a market's theoretical audience reach to account for this disparity . . . Furthermore, the discount approach provides a measure of the actual voice handicap and is therefore consistent with our traditional diversity objectives.

Id. at 93-94. One petitioner even urged the Commission "to establish a 'slightly higher' market penetration cap for non-network group owners with substantial UHF interests." *Id.* at 79. The Commission also flatly rejected that approach. The Commission focused on the "actual voice handicap" when defining the UHF problem. It chose to make a rule that measured existing technological differences rather than make a rule that directly increased the cap.

In 1995, the Commission sought comment on whether it should modify or eliminate the UHF discount in light of existing or changed disparities between VHF and UHF signals. *TV Ownership Further Notice*, 10 FCC Rcd 3524, 3568-69 ¶ 102 (1995). However, before the Commission acted in this proceeding, Congress passed the Telecommunications Act. Pub L.No. 104-104, 110 Stat. 56 (1996) (1996 Act). Section 202(c) of that Act directed the FCC to "modify

its rules for multiple ownership set forth in section 73.3555 of its regulations . . . by increasing that national audience reach limitation for television stations to 35 percent."

While the Commission promptly implemented the new percentage limitation, *Implementation of the Telecommunications Act*, 61 Fed. Reg. 10691 (Mar. 15, 1996), it also issued a Notice of Proposed Rulemaking concerning issues relating to the implementation of the audience reach limitation. *Broadcast Television National Ownership Rules NPRM*, 11 FCC Rcd 19949 (1996). There, the Commission noted that the 1996 Act "did not address the issue of the measurement of audience reach for the purposes of the new limits." *Id.* at 19949. The Commission interpreted this silence as leaving intact the Commission authority to modify or repeal the UHF discount if the record warranted such action. Indeed, the Commission reviewed the comments and "based on the current record . . . decided to defer any further review of this policy to the biennial review of our broadcast ownership rules that we will conduct in 1998 pursuant to the 1996 Act." *Id*. at 19955. The Commission believed it would then be in a better position to assess how the continuing growth in the availability and penetration of cable and other multichannel video program suppliers, as well as the impact of a digital television (DTV) Table of Allotments affected the need for the UHF discount. *Id.* The Commission also requested additional comment on "whether it should impose in the interim any supplementary limitation on national audience reach." *Id*. at 19956.

In the 1998 Biennial Review NOI, the Commission explicitly requested comment "on whether the UHF discount should be retained, modified, or eliminated." 13 FCC Rcd 11276, 11285 ¶27 (1998). In its Report, the Commission found that "[w]hile the technical and engineering evidence submitted by commenters continues to support the UHF discount, we believe that it will likely not continue to do so in the future." *1998 Biennial Report*, 15 FCC Rcd

11058, 11080 (1998). Noting that the existing UHF discount will "not work well for DTV," the Commission said that when the transition to DTV was nearing completion, it would "issue a Notice of Proposed Rulemaking proposing a phased-in elimination of the discount." *1998 Biennial Report*, 15 FCC Rcd at 11058, 11080 ¶ 38 (1998).

In the 2002 Biennial Review, the Commission similarly considered whether to modify or repeal the UHF discount. The Notice of Proposed Rulemaking invited comment on "the relevance and continued efficacy of the UHF discount." *2002 Biennial NPRM*, 17 FCC Rcd 18503, 18544 ¶ 130-31 (2002). After reviewing the comments, the Commission concluded (wrongly in our view) that the current 50% UHF discount continued to be necessary. However, because it found that the digital transition will largely eliminate the technical basis for the UHF discount, it decided to "to sunset the application of the UHF discount for the stations owned by the top four networks (i.e., CBS, NBC, ABC, and Fox) as the digital transition is completed on a market-by-market basis." *2002 Biennial Report*, 18 FCC Rcd 13620, 13845-47 ¶ 585-91 (2002). The Commission explained that the "sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition . . . in a subsequent biennial review, we will determine whether to include stations owned by these other networks and station group owners in the sunset provision we have established for stations owned by the top four broadcast networks." *Id.* at 13847 ¶ 591. The 2002 Biennial Report thus posed several questions to be addressed in the future. Resolving when to sunset the UHF discount, which market to sunset first, and whether any other stations or networks besides the top four should also be included in the sunset clause are issues that require the reasoned decision-making of an expert agency.

Several parties, including UCC *et al.*, petitioned the Commission to reconsider many aspects of the 2002 Biennial Report, including the decision to generally retain the 50% UHF discount. Those petitions are still pending. In its petition, UCC contends that the UHF discount is obsolete because 86% of households receive both UHF and VHF stations by cable or satellite, the decision to keep the 50% discount is arbitrary and capricious because the Commission does not discount UHF stations for the purposes of local television rules or the CML, and lower station profitability is not a public interest concern and should not have been considered in the rulemaking. *UCC Petition for Reconsideration*, MB Docket No. 02-277 (Sept. 4, 2003).

In January 2004, Congress passed the Consolidated Appropriations Act which included Section 629. *Consolidated Appropriations Act of 2004*, Pub. L. No. 108-199 § 629, 118 Stat. 3 (2004) (Appropriations Act). This section makes three changes to the 1996 Telecommunications Act. On February 19, 2004, the Mass Media Bureau issued a Public Notice seeking additional comment on whether the enactment of Section 629 affected the Commission's authority to modify or eliminate the UHF discount. *Additional Comment Sought on UHF Discount*, MB Docket No. 02-277, 69 Fed. Reg. 9215, 9215-17 (Feb. 27, 2004). As demonstrated below, Section 629 does not express any intent to affect the Commission's authority to modify or eliminate the UHF discount, nor can it reasonably be interpreted to do so.

I. SECTION 629(1) OF THE APPROPRIATIONS ACT DOES NOT CHANGE THE FCC'S ESTABLISHED AUTHORITY TO MODIFY OR ELIMINATE THE UHF DISCOUNT

Section 629(1) of the Appropriations Act directs that the Telecommunications Act of 1996 be amended "in section 202(c)(1)(B) by striking '35 percent' and inserting '39 percent'." Thus, as amended, Section 202(c)(1) reads: "The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations . . . by increasing the national audience

reach limitation for television stations to 39 percent." This change does not affect the Commission's authority over the UHF discount. It acts only to roll back the overly-deregulatory 45% national ownership cap set by the Commission in the 2002 Biennial Report. This provision does not mention or refer to the UHF discount in any way and does not affect the Commission's jurisdiction over the UHF discount.

In Section 629(1), Congress makes a single and very clear change to the 1996 Act, expressing only one unambiguous intent: to lower the cap from 45% to 39%. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Bd. of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron U.S.A. Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Section 629(1) does one simple thing. It changes one word in the 1996 Act to read "39" instead of "35." Congress intended only to establish the national audience reach limitation that it deemed appropriate. The language is clear and cannot be interpreted to alter the FCC's authority to determine the methodology for calculating the limitation.

Nonetheless, proponents of retaining the 50% UHF discount have argued that by leaving the "national audience reach limitation" language unchanged, Congress inherently approved the method for counting this limit, including the UHF discount, in 47 C.F.R. § 73.3555(d)(2)(i). *See* Paxson and Univision Letter Brief, *Prometheus Radio Project v. FCC*, 3d Cir. No. 03-3388 (Feb. 2, 2004). However, this position mischaracterizes the well-established principles of statutory interpretation. "To freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to stay in place." *AFL-CIO v. Brock*, 835 F.2d

912, 916 (D.C. Cir. 1987). By simply using the words "national audience reach," Congress did not evince any desire, nor did it provide any affirmative indication of an intent to freeze the UHF discount.[1]

At most, the fact that Congress left "national audience reach limitation" unchanged signals Congressional approval of all Commission policies that make up the phrase "national audience reach limitation," rather than specific approval of just the 50% UHF discount. At the very core of the policy of "national audience reach limitation" is the FCC's authority to modify or eliminate the UHF discount based on the evolution of technological and competitive conditions. When Congress directed the FCC to increase the national audience limit from 25% to 35% in 1996, it used the "national audience reach" language already used in the FCC's regulatory decisions. *Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524, 3560 ¶ 81 (1995). Despite the use of that language, the FCC continued to reexamine the UHF discount, correctly interpreting that Congressional use of the agency's regulatory language did not preclude it from prospectively altering those regulations. The FCC has continued to frame its review of the UHF discount by asking whether the discount is still necessary in light of technological and market changes. *See supra* p.2-5. If the argument that mere use of the phrase "national audience reach limitation" freezes the UHF discount were true, then the discount would have been frozen in 1996 and the Commission would not have been authorized to continue reviewing the methodology.

[1] Even if reenactment of the "national audience reach" language signals Congressional approval of the UHF Discount, the Supreme Court has stated that such legislative reenactment of an agency policy does not preclude the agency from subsequently changing that policy. *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-01 (1939). At the minimum, for a statute to be interpreted as ratifying an administrative interpretation, the legislative history must show express approval of longstanding administrative interpretation, a factor that is absent in this case. *United States v. Sheffield Bd. Of Comm'rs*, 435 U.S. 110, 134-35 (1978).

In sum, Section 629(1) does not evince any intent to remove the FCC's authority to modify or repeal the UHF discount. If the phrase "national audience reach limitation" were construed as approval of the FCC's methodology for calculating the percent of the limit, then it would include ratification of the FCC's inherent authority to modify the methodology as the public interest requires.

II. THE PLAIN LANGUAGE OF SECTION 629(2) OF THE APPROPRIATIONS ACT DOES NOT AFFECT THE FCC'S AUTHORITY TO MODIFY OR ELIMINATE THE UHF DISCOUNT

Section 629(2) of the Appropriations Act changes Section 202(c) of the Telecommunications Act by adding the following new paragraphs at the end:

> "(3) Divestiture.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth. "(4) Forbearance.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B)."

Section 629(2) does not affect the Commission's authority over the UHF discount. New subsection (3) codifies existing FCC policies of granting temporary waivers to allow transfers and not requiring divestiture if an owner exceeds the audience limitation in circumstances other than by population growth. *See, e.g. Applications of UTV San Francisco and Fox Television Stations (Fox/Chris-Craft Merger),* 16 FCC Rcd 14975 (2001). New subsection (4) prevents the FCC from using Section 10 of the Telecommunications Act, which allows the FCC to forbear from enforcing certain telecommunications rules, to forbear from applying the 39% cap. Thus, Section 629(2) addresses resolutions to circumstances in which the 39% cap may be exceeded; it

does not in any way address the method of measuring the 39% nor does it affect the Commission's authority to modify the UHF discount.

Moreover, Section 629(2), which explicitly codifies already existing FCC practices, demonstrates that Congress could easily have codified the UHF discount if that was its intent. Congress was aware of UHF discount issue, which had been raised in hearings in the Senate well before the Appropriations Act was passed. *Media Ownership Rules, Hearing of the Senate Commerce, Science and Transportation Committee, Federal News Service* (June 4, 2003). Thus, the fact that it could have acted explicitly to codify the 50% UHF discount, much as it did to codify the practice of temporary waivers, and did not is evidence of intent not to limit the FCC's authority.

III. SECTION 629(3) DOES NOT IMPACT THE FCC'S AUTHORITY TO MODIFY OR ELIMINATE THE UHF DISCOUNT

Section 629(3) does not affect the Commission's authority over the UHF discount. Section 629(3) merely changes Section 202(h) of the Telecommunications Act to read:

> FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules *quadrennially* as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify and regulation it determined to be no longer in the public interest. *This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).*

(1996 Act Pub L.No. 104-104, 110 Stat. 56 § 202(h) as amended) (emphasis added). Section 202(h) originally directed the FCC to review of all the broadcast ownership rules every two years. Section 629(3) amends Section 202(h) to direct the FCC to perform this review quadrennially instead of biennially, and further instructs the Commission not to include rules relating to the 39% national audience reach in the quadrennial review. Nothing in the

amendment directs the Commission regarding the underlying methodology or process of calculation, therefore Section 629(3) does not limit the FCC's authority to revise the UHF discount.

A. The Plain Language Of Section 629(3) Is Not Explicit Enough To Require Codification Of An Underlying Methodology

To ascertain the plain meaning of the statute, a reviewing court will look to the particular statutory language at issue, as well as the purpose of the statute as a whole. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). Here, Section 202(h) "does not apply to any rules relating to the 39 percent national audience reach limitation." The plain language does not mention the UHF discount and does not refer to the methodology used to calculate the cap. The language serves only to limit when the FCC can review that national audience reach limitation. Because the intent of the statute is to lower the national audience reach limitation from 45% to 39% and thereby prevent further consolidation, inferring that the UHF discount is frozen at 50% and can never be lowered by the FCC would be illogical.

Although some may argue that the phrase "any rules relating to the 39 percent national audience reach limitation" includes the methods for calculating that reach, the underlying methodology is not inherently or automatically frozen merely by general mention of the regulation. For example, in *AFL-CIO v. Brock*, Congress reenacted a law governing the pay of migrant guest workers and made explicit reference to the Department of Labor's traditional "adverse effects" test. 835 F.2d at 914-15. The court rejected arguments that by making explicit reference to the test, Congress had codified the regulations and methodologies underlying the test. *Id*. The DOL had periodically increased the "adverse effects" rates over the previous twenty years and subsequent to the Congressional reenactment, it changed the formula for

determining the monetary value of the "adverse effect." *Id*. The court found that while Congress may have intended to endorse the concept of the "adverse effects" test, it gave no indication that it cared about how the agency calculated this effect. *Id.* at 916-17. Congress had "never paid any attention to the method or policy of counting [adverse effects] . . . calculating [adverse effects] has been left entirely to the Department's discretion." *Id.* at 915. Thus, endorsement of the general concept did not constitute endorsement of the methodology. Moreover, even presuming Congress knew the traditional method of calculation, the court held that mere reenactment absent a "strong affirmative indication" that Congress in fact intended to deprive the agency of discretion cannot "freeze" an agency interpretation into law. *Id.* at 916.

Section 629(3) presents a less compelling case for inferring Congressional intent to prevent an agency from changing its practice. First, unlike the statute in *Brock*, Congress did not make explicit reference to the UHF discount. Second, Congress gave no signal, much less a "strong affirmative indication," that it intended to "freeze" the UHF discount. Congress also has never legislated regarding the UHF discount. Thus, nothing in Section 629(3) limits FCC authority to modify or eliminate the UHF discount.

B. Even If Section 629(3) Were Not Entirely Clear, The Only Reasonable Interpretation Is That The FCC Retains The Authority To Modify Or Eliminate The UHF Discount

Although Section 629(3) does not on its face remove the FCC's authority to modify or eliminate the UHF discount as circumstances warrant, at most, a court might find the phrase "any rules relating to the 39 percent national audience reach limitation" ambiguous. Where the meaning is ambiguous, the court will defer to the Commission's reasonable interpretation. *Chevron*, 467 U.S. at 843.

It is rational and consistent with the Appropriations Act for the FCC to interpret Section 629(3) to allow it to retain the authority to modify or eliminate the UHF discount. This interpretation is consistent with the purpose of the Act, which is to limit increasing media consolidation by reducing the national audience reach limitation from 45% to 39%, and is consistent with section 202(h), which gives the Commission broad reviewing authority. Moreover, stripping FCC authority over the UHF discount would lead to illogical results that fly in the face of the purpose of the Appropriations Act, the 1996 Act, and Supreme Court standards of statutory interpretation.

1. Eliminating FCC Authority To Modify The UHF Discount Would Be Inconsistent With The Purpose Of Section 629

The Appropriations Act amendment was adopted because of widespread Congressional concern over the excessively deregulatory nature of the 2002 Biennial Review Order. Thus, the 39% cap precludes further consolidation, and the quadrennial review significantly slows the pace of the FCC's deregulatory efforts. It is implausible that Congress would simultaneously freeze the UHF discount, since that would promote consolidation and preclude further tightening of the UHF discount. The goal of the Appropriations Act is clear: Congress did not approve of the Commission's decision to raise the cap to 45% and chose to lower the audience reach limitation to 39%.

Freezing the UHF discount goes against the re-regulatory purpose of the Appropriations Act. If the UHF discount were to remain frozen, it would allow significant media consolidation in the future, particularly as the transition to DTV occurs. If the 50% discount remains in effect at the end of the transition to digital television, it would result in extreme and massive consolidation because most of the VHF television stations on the air today will become UHF

stations and would qualify for the Discount. *Advanced Television Systems and Their Impact upon Existing Television Broadcast Service*, 7 FCC Rcd 5376, 5379 ¶ 17 (1992).

Interpreting Section 629(3) to freeze the UHF discount also goes against the purpose of Section 202(h) which authorizes the FCC to do a broad "top-to-bottom" review of "a wide range of Commission regulations." *1998 Biennial NPRM*, 13 FCC Rcd 11276, 11276 ¶ 1 (1998). Section 629(3) creates an exception to 202(h), but that exception must be interpreted narrowly in light of the broad authority conferred to the FCC by the 1996 Act. In *Commissioner of Internal Revenue Service v. Clark*, 489 U.S. 726 (1989), the Court stated that when construing an exception, "we usually read the exception narrowly in order to preserve the primary operation of the provision . . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process . . . [W]e should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Id* at 739 (citations omitted). Section 629(3) only excludes the 39% cap in a plain and unmistakable manner. It does not exclude review of the underlying methodologies. Thus, a reading of Section 629(3) that removes FCC authority over the discount flies in the face of Supreme Court practices of statutory interpretation.

2. Because The FCC Has Already Approved a Plan To Sunset the UHF Discount, It Is Illogical To Believe That Congress Intended To Limit FCC Authority Without Clarifying The Status Of The Discount

If Congress had intended to remove the Commission's authority to modify or repeal the UHF discount, it would have made clear whether it was freezing the UHF discount as it existed before or after the 2002 Biennial Report. While the Commission generally decided to retain the 50% discount for the time being in the 2002 Biennial Report, it sunset the discount for the top

four broadcast networks on a market-by-market basis as the DTV transition occurs. *2002 Biennial Report* 18 FCC Rcd at 13847 ¶ 591. The Commission decided that sunset will occur unless it affirmatively determines in the future that the public interest would be better served by continuing the Discount beyond the digital transition. *Id*. The Commission also explained its plans to decide in a future biennial review whether to include other stations and networks in the sunset provision. *Id*.

If Congress had intended to limit the FCC's authority to modify the UHF discount, logically it would have addressed the scope of that limitation. For instance, did Congress intend to freeze the sunset provision as well? If so, would the Commission have authority to affirmatively decide that sunsetting the Discount is not in the public interest? How would the market-by-market determination be made if the FCC no longer has authority over the UHF discount? If Congress removed FCC authority, did it intend to approve applying the sunset provision only to the top four networks and not to any other station or company in the media marketplace?

The consequences of limiting FCC authority to modify or repeal the UHF discount are potentially huge, and at best very unclear, if the Commission were to interpret the ambiguity in the statute to strip its authority over the UHF discount. It is illogical to believe that Congress chose to limit the expert agency's authority in area that continues to be fluid and require attention.

3. Interpreting The Appropriations Act As Freezing The UHF Discount Would Have Additional Illogical And Unintended Consequences

Interpreting the Appropriations Act as depriving the FCC of authority to amend 47 C.F.R. § 73.3555(d)(2)(i), which contains the UHF discount, would also have the bizarre effect of

locking in the FCC to forever using Nielson's Designated Market Areas. The first sentence of that rule defines national audience reach by using the total number of television households in the Nielsen Designated Market Area (DMA).[2] Nielson is a private company that provides the Commission with proprietary data used to actually count the audience reach in a market. The Commission has no control over Nielson's methodology or business practices. If Nielson were to stop collecting data, or start providing faulty or incomplete market information, the FCC needs to have the authority to find another means by which to get actual audience numbers.

In fact, the FCC has had to change its method of receiving audience size statistics before. In 1985, the FCC calculated national audience reach as a percentage of all Arbitron ADI television households. *Rules Relating to the Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, ¶ 39 (1985). In 1999, the Commission switched to Nielson because:

> Arbitron no longer updates its county-by-county determination of each broadcast station's ADI. Accordingly, we proposed to use Designated Market Areas (DMAs) as compiled by A.C. Nielson Media Research – another commercial ratings service . . . . [I]n some instances the use of DMAs instead of ADIs might lead to small variations in audience reach calculations of some stations, because in some instances Arbitron and Nielson define markets somewhat differently.

Broadcast Television National Ownership Rules, 15 FCC Rcd 20743, 20752-53, ¶ 31-32 (1999).

Just as the FCC found it necessary to stop using Arbitron markets for determining

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[2] The method of measuring national audience reach is described in one subsection that explains both the use of Nielson data and the UHF discount. 47 C.F.R. § 75.3555(d)(2)(i) reads:

> "*National audience reach* means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market." (emphasis in original).

audience reach, the FCC might find that Nielson no longer meets its needs, or Nielson could go out of business. If the prohibition on modifying "any rules related to" the 39% national audience reach deprives the FCC of authority to change the UHF discount, it would freeze the use of Nielson data as well. It is implausible that Congress would have intended that illogical result.

4. At Most, The Plain Language Of The Revised 202(h) Only Prevents The Commission From Reviewing The UHF Discount During The Quadrennial Review, But Not At Other Times

Even if the Commission determines that the Appropriations Act limits its authority to modify or eliminate the UHF discount, the prohibition only exists during the statutorily mandated periodic review of the media ownership rules. Section 629(3) states that "rules related to" the 39% cap will not be reviewed under 202(h), which mandates review of the rules every four years. However, it is the Commission's regular practice to institute rulemakings outside of the mandated biennial, triennial (and now) quadrennial reviews in the Telecommunications Act of 1996, so the FCC could modify or eliminate the UHF discount anytime outside the quadrennial review.

CONCLUSION

For the foregoing reasons, UCC believes that the FCC continues to have the authority to modify or eliminate the UHF discount. We respectfully request that the FCC act upon petitions for reconsideration filed in the proceeding and eliminate or modify the 50% UHF discount to accurately reflect current market conditions.

Respectfully Submitted,

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